(6)

No. 96-6839

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGO ROMAN ALMENDAREZ-TORRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

68 pp

QUESTION PRESENTED

Whether 8 U.S.C. 1326(b)(2), which relies on prior criminal history to increase the maximum authorized term of imprisonment for a deported alien who illegally reenters the United States in violation of 8 U.S.C. 1326(a), is a separate criminal offense or a constitutionally valid sentencing enhancement provision.

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OPINION BELOW

The opinion of the court of appeals (J.A. 18-19) is reported at 113 F.3d 515.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1996. The petition for a writ of certiorari was filed on November 20, 1996, and granted on March 31, 1997 (J.A. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

As of July 28, 1995, the date of petitioner's offense, Section 276 of the Immigration and Nationality Act (INA) provided:

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which the alien stipulates to deportation during a criminal trial under either Federal or State law.

8 U.S.C. 1326 (1994).[1]

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of reentering the United

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[1] Unless otherwise indicated, we refer to the codified version of Section 276 of the INA, 8 U.S.C. 1326 (1994), and its subsections in effect at the time of petitioner's offense. The statute has been amended on two subsequent occasions. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 324, 110 Stat. 3009-606, 3009-618, 3009-619, 3009-620, 3009-629. We set forth the texts of the various versions of the statute as codified in 1952 and after each subsequent amendment, with additions and deletions indicated, at App., *infra*, 1a-14a; see also pp. 15-17, 24-31, *infra* (discussing amendments). Because Title 8 has not been enacted into law, the appendix also notes some differences between the codified versions of Section 1326 and the versions found in the Statutes at Large.

States, after having been deported, without the prior consent of the Attorney General to reapply for admission, in violation of 8 U.S.C. 1326. He was sentenced to 85 months' imprisonment, to be followed by two years' supervised release. J.A. 17. The court of appeals affirmed. J.A. 18-19.

1. a. In 1980, petitioner, a national of Mexico, entered the United States illegally. In 1989, he was adjusted to the status of a lawful permanent resident. On March 11, 1991, petitioner was convicted in Tarrant County, Texas, of burglary of a habitation. On March 14, 1991, he was convicted in Dallas County, Texas, of burglary of a habitation. On July 26, 1991, he was again convicted in Tarrant County of burglary of a habitation. Petitioner was sentenced in state court to a term of imprisonment. In 1992, he was paroled, at which time he was released to the custody of the Immigration and Naturalization Service (INS) pursuant to a detainer. On April 18, 1992, the INS deported petitioner from the United States. See J.A. 6-7, 12-14; Presentence Report (PSR) 1-5.

Two months later, in June 1992, petitioner reentered the United States by crossing the Rio Grande River near Laredo, Texas, and evading inspection by immigration officials. On July 28, 1995, an agent of the United States Border Patrol found petitioner at a jail in Tarrant County, Texas, where petitioner was incarcerated on new, unrelated charges. Investigation revealed that petitioner had not received the prior consent of the Attorney General to reapply for admission, as required under 8 U.S.C. 1326, when an alien who has been previously deported returns to the United States. J.A. 6-7, 13.

b. Section 1326(a) provides that, subject to Section 1326(b), a previously deported alien who reenters the

country without obtaining the prior consent of the Attorney General to reapply for admission shall be sentenced to a term of imprisonment up to two years, or fined under Title 18, or both. Section 1326(b)(2) authorizes a term of imprisonment of up to 20 years in a case where an alien who commits such an offense was convicted of an aggravated felony (defined in 8 U.S.C. 1101(a)(43)) before his deportation.

2. On September 12, 1995, petitioner was charged in the United States District Court for the Northern District of Texas in a one-count indictment, alleging

> [t]hat on or about July 28, 1995, in the Fort Worth Division of the Northern District of Texas, HUGO ROMAN ALMENDAREZ-TORRES, defendant, an alien, who had been previously arrested and deported from the United States on or about April 18, 1992, knowingly and unlawfully was found in the United States, that is, he did not, prior to his re-entry into the United States after being deported, obtain permission and consent of the Attorney General to re-enter the United States.
>
> A violation of Title 8, United States Code, Section 1326.

J.A. 3.

On December 1, 1995, petitioner, without a plea agreement, pleaded guilty to the indictment. PSR ¶ 54. Before acceptance of petitioner's guilty plea, the district court reviewed with petitioner a written statement of the facts and elements of the offense and the authorized maximum sentence, which petitioner, his counsel, and government counsel had signed. See J.A. 5-7, 9. In accord with the signed document, the court informed petitioner that the elements of the

charged offense were (1) that petitioner was an alien unlawfully found in the United States on or about the date alleged; (2) that petitioner had been previously arrested and deported from the United States; and (3) that petitioner had not obtained permission to reenter the United States from the Attorney General. J.A. 5-6, 10. Petitioner stated that he understood the nature of the offense and admitted that each of the elements existed in his case. J.A. 11. Also in accord with the document signed by petitioner, the court informed him that the maximum penalty of imprisonment that could be imposed in his case was ten years, along with a fine and a period of supervised release. J.A. 5, 12. Petitioner stated that he understood that he was exposed to those penalties by his plea of guilty. J.A. 12. As part of the factual basis for his plea, petitioner admitted the details of his immigration history, including his prior deportation and subsequent illegal reentry. He also admitted that, before his previous deportation, he had been convicted in state court on three different occasions of burglary of a habitation. J.A. 13-14.

3. a. The presentence report prepared for petitioner's sentencing stated that the maximum term of imprisonment authorized for petitioner's offense was ten years, PSR ¶ 52, and that the applicable Guidelines range was 77 to 96 months' imprisonment, PSR ¶ 53. In reviewing the PSR, the government realized that the maximum sentence authorized in petitioner's case had been misstated in the PSR and at the plea proceeding and requested that the PSR be corrected to state that the maximum term of imprisonment authorized in the case is 20 years. PSR addendum 1. The government noted, however, that the correction would have no effect on petitioner's case because his

Sentencing Guidelines range was less than the ten years' maximum of which he had been advised. *Ibid.* The PSR was amended to state that the maximum term of imprisonment authorized in this case is 20 years. *Id.* at 1-2; J.A. 16.

Petitioner objected to the PSR, contending that the maximum sentence authorized in his case is two years. He argued that Section 1326(b)(2) defines a substantive offense separate from the offense defined by Section 1326(a) and that the subsection (b)(2) offense contains the additional element of a prior aggravated felony conviction. Because the indictment did not allege that additional "element," petitioner contended that the enhanced penalty authorized in Section 1326(b)(2) is inapplicable to his case. PSR addendum 2; see also J.A. 16-17 (renewing objection at sentencing hearing).

b. The district court overruled petitioner's objection and adopted the findings and conclusions set forth in the PSR and its addendum. J.A. 17. The court sentenced petitioner to 85 months' imprisonment, to be followed by two years' supervised release. *Ibid.*

4. The court of appeals affirmed. It held that petitioner's argument was foreclosed by its opinion in *United States* v. *Vasquez-Olvera*, 999 F.2d 943 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). J.A. 18-19. The court in *Vasquez-Olvera* held that Section 1326(b) is a penalty provision rather than a separate substantive offense. Accordingly, the court in *Vasquez-Olvera* explained, a defendant's aggravated felony conviction need not be charged or proven as an element of the offense in order to support an enhanced maximum sentence under Section 1326(b)(2). 999 F.2d at 945-946.

SUMMARY OF ARGUMENT

Section 1326(b)(2) is a sentencing enhancement provision, not a separate criminal offense. The effect of Section 1326(b)(2) is to lengthen the maximum term of imprisonment to which an alien is exposed when the alien, having committed an illegal-reentry-after-deportation offense under Section 1326(a), is determined to have been convicted before deportation of an aggravated felony. The text, structure, history, and evolution of Section 1326 establish that Congress intended Section 1326(b) to identify sentencing factors bearing on penalty (*i.e.*, a defendant's criminal history before his deportation), not to create a separate and independent criminal offense (in which criminal history would be an element of the crime).

The text of Section 1326 makes that point clear. Section 1326(a) provides that, "[s]ubject to subsection (b)," any alien who has been deported and reenters the country without the prior consent of the Attorney General to reapply for admission shall be sentenced to a term of imprisonment of up to two years, and fined under Title 18, or both. Subsection (a) thus identifies the conduct involved in the illegal-reentry offense. Section 1326(b)(2) provides that, "[n]otwithstanding subsection (a)," when an alien described in that subsection had been deported after a conviction for an aggravated felony, the authorized maximum term of imprisonment is increased to 20 years. Subsection (a) is thus structured so that imposition of a penalty under subsection (b) is predicated on the alien's coverage under (a); subsection (b) simply increases the authorized penalty beyond that provided in (a). A prior conviction that supports an enhanced sentence

under subsection (b) is therefore not an element of the offense and need not be charged or proven at trial.

That straightforward reading of Section 1326(b)(2) as a penalty provision is confirmed by the provision's legislative history. Subsequent legislation is also consistent with that interpretation. Nine courts of appeals have adopted that interpretation, and the reasoning underlying the Ninth Circuit's conflicting ruling is unpersuasive. Finally, the rule of lenity does not require adoption of petitioner's contrary statutory interpretation because there is ample guidance as to Congress's intent.

The Constitution permits Congress to provide, as it has in Section 1326(b), that a sentencing factor enhance the maximum term of imprisonment for a defendant found guilty of an illegal reentry offense. The fact that a prior conviction increases the maximum penalty authorized for a particular offense does not transform the prior conviction into an element of the offense or otherwise require that it be proven beyond a reasonable doubt. The Court has expressly "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84 (1986) (citing *Patterson* v. *New York*, 432 U.S. 197, 214 (1977)). And a traditional sentencing factor, such as a prior conviction, may constitutionally be treated as a basis for sentence enhancement even where, as under subsection (b), the defendant's criminal record significantly increases the maximum punishment to which he is exposed. See *Graham* v. *West Virginia*, 224 U.S. 616 (1912).

ARGUMENT

SECTION 1326(b)(2) IS A VALID PENALTY ENHANCEMENT PROVISION, NOT A SEPARATE CRIMINAL OFFENSE

It is well established that all elements of a criminal offense must be included in an indictment charging a violation of that offense. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). An indictment is sufficient under the Fifth Amendment if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and * * * enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." 418 U.S. at 117. It is equally well established that due process requires that all elements of a criminal offense be proven beyond a reasonable doubt to support a conviction. *In re Winship*, 397 U.S. 358, 364 (1970).

There is no constitutional mandate that such procedures and standards be met, however, for factors that bear only on the defendant's sentence. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84-86 (1986). Sentencing factors that are not elements of the underlying criminal offense need not be pleaded or proven at trial. *Ibid.* Therefore, in order to determine whether a factor must be charged and proven at trial, it must be determined whether the factor is an element of the offense or a sentencing factor. That determination depends on the intent of the legislature because "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S.

419, 424 (1985) and citing *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812)). While there are constitutional limits beyond which a legislature may not go, it is clear that the government need not include as elements and prove beyond a reasonable doubt all facts that bear on the severity of the criminal penalty. *McMillan*, 477 U.S. at 84, 85. The intent of Congress in its definition of the elements of a criminal offense is to be derived from the language, structure, and history of the statute. *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997); *United States* v. *Wells*, 117 S. Ct. 921, 928 (1997); *Garrett* v. *United States*, 471 U.S. 773, 779 (1985).[2]

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[2] Petitioner seems to suggest (Pet. Br. 20-26) that *Garrett* requires application of the four-factor test developed by the Fifth Circuit in *United States* v. *Davis*, 801 F.2d 754 (5th Cir. 1986), and that that test is dispositive. *Garrett* does not state a new test, as petitioner's amicus acknowledges. See Nat'l Association of Criminal Defense Lawyers Amicus Br. 28. The factors cited by *Davis* were simply features of one sentencing provision (fomer 18 U.S.C. 849) discussed by the *Garrett* Court as relevant to its textual and structural analysis of another provision (creating the continuing criminal enterprise offense). See 471 U.S. at 779-782. The Court did not describe those factors as a "test"; indeed, the *Garrett* Court characterized another provision (18 U.S.C. 848(a)(1)) as "contain[ing] language that is typical" of a recidivist provision, without applying a four-factor test. See 471 U.S. at 782. That latter provision is comparable to Section 1326, in that it enhances the authorized sentence of an offender who "engages" in prohibited conduct after having sustained prior convictions under the same section. 18 U.S.C. 848(a)(1) .

A. The Statutory Text and Structure Establish that Section 1326(b)(2) is a Penalty Enhancement Provision

1. a. The text of 8 U.S.C. 1326 reflects Congress's intent to define a single offense based on a deported alien's illegal reentry, and to vary the severity of the penalty according to the offender's criminal history before his deportation. Subsection (a) defines the elements of the offense by making it a crime for an alien to reenter the United States, after having been deported, without the prior consent of the Attorney General to reapply for admission. See 8 U.S.C. 1326(a). Subsection (a) further specifies that, "[s]ubject to subsection (b)," any alien who commits such offense "shall be fined under title 18, or imprisoned for not more than 2 years, or both." *Ibid.* Giving the words their ordinary meaning, the introductory clause, "[s]ubject to subsection (b)," conditions the severity of the penalty imposed under subsection (a) on any modification of the authorized penalty that is required by subsection (b). See *Webster's Third New International Dictionary* 2275 (1976) (entry 2, def. 4: defining "subject" to mean "likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu. dependent on such relation for final form, validity, or significance"); *The Random House Dictionary of the English Language* 1893 (2d ed. 1987) (def. 20: defining "subject" to mean "being dependent or conditional upon something (usually fol. by *to*)"); *The American Heritage Dictionary of the English Language* 1788 (3d ed. 1992) (def. 4: defining "subject" to mean "[c]ontingent or dependent").

Subsection (b), 8 U.S.C. 1326(b), provides that, "[n]otwithstanding subsection (a)," in "the case of

any alien described in such subsection," *i.e.*, an alien who has committed the offense defined by subsection (a), specified punishments, greater than that authorized under subsection (a), are authorized for certain aliens who fall within one of the subsection (b) categories. Subsections (b)(1) and (b)(2) enhance the maximum penalty based on the alien's criminal history before deportation.[3] Giving the words their ordinary meaning, the phrase "[n]otwithstanding subsection (a)" authorizes imposition of the greater penalties specified in subsection (b) for a subset of aliens who violate subsection (a), in spite of the lesser penalty otherwise provided for in subsection (a). See *Webster's Third New International Dictionary* 1545 (1976) (entry 1: defining "notwithstanding" to mean "without prevention or obstruction from or by: in spite of"); *The Random House Dictionary of the English Language* 1326 (2d ed. 1987) (def. 1: defining "notwithstanding" to mean "in spite of; without being imposed or prevented by").

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[3] Subsection (b)(1) raises the maximum term of an alien who was convicted of "three or more misdemeanors involving drugs, crimes against the person, or both," or was convicted of a "felony (other than an aggravated felony)," before his deportation to not more than ten years' imprisonment. 8 U.S.C. 1326(b)(1). Subsection (b)(2), the provision at issue here, raises the maximum term of an alien who was convicted of "an aggravated felony" before his deportation to not more than 20 years' imprisonment. 8 U.S.C. 1326(b)(2).

Subsections (b)(3) and (b)(4) were added in 1996. See Pub. L. No. 104-132, § 401(c), 110 Stat. 1267; Pub. L. No. 104-208, § 305(b), 110 Stat. 3009-606. They authorize certain punishments in cases where an alien was involved with terrorist activities or was serving a sentence for another criminal offense at the time of his deportation. See pp. 27, 29, *infra*.

Because the application of subsection (b) is predicated on a violation of subsection (a), subsection (b) does not define a separate offense. "[S]ubsection (b) cannot stand on its own as a separate offense without reference to subsection (a), as it 'clearly predicates punishment upon conviction of the underlying crime.'" *United States* v. *Haggerty*, 85 F.3d 403, 405 (8th Cir. 1996) (citation omitted); see also *United States* v. *Valdez*, 103 F.3d 95, 98 (10th Cir. 1996); *United States* v. *Vasquez-Olvera*, 999 F.2d 943, 946 (5th Cir. 1993), cert. denied, 510 U.S. 1076 (1994). Subsection (a) defines the crime of illegal reentry after a previous deportation by identifying the conduct involved in the offense. Subsection (b) does no more than single out subsets of persons who commit that crime for more severe punishment. "Clearly the 'notwithstanding' language refers to the less harsh penalties of subsection (a) and the 'subject to' clause allows the greater penalties of subsection (b) to apply where appropriate. This linguistic structure of section 1326 belies any imputation of Congressional intent to establish * * * separate offenses." *United States* v. *Campusano*, 906 F. Supp. 288, 290 (D.V.I. 1995). "It is highly unlikely that Congress would structure the statute in such a way that subsection (b) is dependent on elements of subsection (a), if it intended for subsection (b) to be a separate criminal offense." *Vasquez-Olvera*, 999 F.2d at 946; *United States* v. *Crawford*, 18 F.3d 1173, 1177 (4th Cir.), cert. denied, 513 U.S. 860 (1994).[4]

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[4] The specification of an offense in one subsection of a statute followed by penalties in a second subsection is consistent with congressional practice in other criminal statutes. For example, the Second Circuit has observed that "Section 1326 is analogous to a frequently invoked narcotics-offense statute, 21 U.S.C. § 841." *United States* v. *Cole*, 32 F.3d 16, 18 (2d Cir.), cert. denied, 513 U.S. 993 (1994). That court viewed the relationship between subsections (a) and (b) of Section 1326 to be analogous to the relationship between subsections (a) and (b) of 21 U.S.C. 841, with (a) defining a criminal offense and (b) listing penalties for violating (a). 32 F.3d at 18-19. The court explained that, under Section 841(b), the sanctions become harsher depending not only on the type and quantity of controlled substances involved, but "[m]ore important for our analysis, each subdivision of subsection (b) provides a longer statutory maximum for defendants with prior convictions, just like the subdivisions [(1) and (2)] of 8 U.S.C. § 1326(b)." *Id.* at 19. It therefore concluded that, "[i]n the same manner that § 841(b) provides longer statutory maximums for certain narcotics offenders with prior convictions, § 1326(b) provides longer statutory maximums for certain deported aliens with prior convictions who reenter the United States." *Ibid.*

b. An examination of the text and structure of the 1988 amendment to Section 1326 that added subsection (b) also demonstrates that Congress did not intend that provision to define a separate substantive offense. Congress added subsection (b) through Section 7345 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4471. Congress entitled that section "Criminal Penalties For Reentry of Certain Deported Aliens." 102 Stat. 4471. The title corroborates the congressional intent reflected in the text of the statute, *i.e.*, that Section 1326(b) constitute a penalty provision for certain aliens (those with serious criminal histories predating deportation) who violate Section 1326(a). See *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (title of

statute relevant when discerning meaning of statute).[5]

Moreover, the alterations made by the 1988 amendment to the structure of subsection (a) demonstrate that Congress intended subsection (b) to supply penalty enhancements for certain aliens who violate subsection (a). The amendment redesignated the then-existing version of Section 1326 (which had not been amended since enactment in 1952) as new subsection (a) and struck out the first two words, *i.e.* "Any alien," replacing them with "Subject to subsection (b), any alien." 102 Stat. 4471. If Congress had intended to create a new substantive offense through subsection (b), there would have been no reason to change the text of subsection (a). The text would have remained unaltered as a substantive matter, and subsection (b) would have been drafted in a parallel fashion to identify the elements of whatever new offense was intended. Instead, however, Congress maintained the same definition of the illegal reentry offense in Section 1326(a) for all aliens, with the

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[5] Petitioner's attempt to discount the significance of the title chosen by Congress (Pet. Br. 25 n.19) by reliance on *Simpson* v. *United States*, 435 U.S. 6 (1978), is unpersuasive. The Court's conclusion in *Simpson* that Section 924(c) of Title 18 defined a substantive offense, despite the fact that it is contained in a section titled "penalties," was based on lower court opinions that had relied on the distinctive legislative history of Section 924(c) and the text and subject matter of the provision. See 435 U.S. at 10 & n.4 (citing *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir.), cert. denied, 414 U.S. 1070 (1973); *United States* v. *Sudduth*, 457 F.2d 1198 (10th Cir. 1972)). Moreover, petitioner elsewhere concedes (Pet. Br. 21 & n.15) that another provision in Section 924 entitled "penalties" (18 U.S.C. 924(e)) is "unmistakably intended to be [a] sentencing enhancement[]."

proviso in new subsection (b) that certain categories of violators are exposed to greater penalties based on their criminal histories before deportation.

2. The conclusion that Section 1326(b)(2) is a penalty enhancement provision, not a separate offense, is consistent not only with the text and structure of Section 1326 but also with the interpretation given it by the vast majority of courts of appeals. Of the ten circuits that have addressed the issue, all but one agree that Section 1326(b)(2) is a penalty provision.[6]

The lone conflicting circuit is the Ninth Circuit. See *United States* v. *Campos-Martinez*, 976 F.2d 589, 591-592 (9th Cir. 1992). That court relies on an unpersuasive analogy to Section 1325(a), which makes it unlawful for an alien to enter the United States through a means not authorized by immigration officials. Section 1325(a) provides, in relevant part, that "for the first commission of any such offense," the offender can be imprisoned not more than 6 months, and "for a subsequent commission of any such offense," not

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[6] See *Valdez*, 103 F.3d at 97-98 (holding that subsection (b) is a penalty provision, not a separate offense); *Haggerty*, 85 F.3d at 405 (same); *United States* v. *DeLeon-Rodriguez*, 70 F.3d 764, 766 (3d Cir. 1995) (same), cert. denied, 116 S. Ct. 1343 (1996); *United States* v. *Palacios-Casquete*, 55 F.3d 557, 560 (11th Cir. 1995) (same), cert. denied, 116 S. Ct. 927 (1996); *United States* v. *Munoz-Cerna*, 47 F.3d 207, 210 n.6 (7th Cir. 1995) (same); *Cole*, 32 F.3d at 18 (same); *Crawford*, 18 F.3d at 1177 (same); *United States* v. *Forbes*, 16 F.3d 1294, 1298-1300 (1st Cir. 1994) (same); *Vasquez-Olvera*, 999 F.2d at 945-946 (same).

more than 2 years.[7] The Ninth Circuit interprets Section 1325(a) as defining two different offenses; the first offense is a misdemeanor while the second offense is a felony, and a prior conviction of the misdemeanor offense constitutes an element of the felony offense. *United States* v. *Arambula-Alvarado*, 677 F.2d 51 (9th Cir. 1982). When the Ninth Circuit addressed Section 1326, it interpreted it in a similar fashion, without analysis, and held that Sections 1326(a), 1326(b)(1), and 1326(b)(2) each constitute separate criminal offenses. *United States* v. *Gonzalez-Medina*, 976 F.2d 570, 572 (1992); see also *United States* v. *Arias-Granados*, 941 F.2d 996, 998-999 (9th Cir. 1991). When that interpretation was challenged as inconsistent with the text, structure, and history of Section 1326, the Ninth Circuit adhered to its precedent and explicitly held that Section 1326 and Section 1325(a) were analogous in "structure, operation, purpose, and subject matter," and should be

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[7] Section 275(a) of the INA, 8 U.S.C. 1325(a), provides:

§ 1325. Improper entry by alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

treated the same. *Campos-Martinez*, 976 F.2d at 591-592.

It is by no means established, however, that the provision in Section 1325(a) that provides enhanced punishment for a second offense defines a separate offense and is not simply a sentence enhancement provision. See, *e.g.*, *Vasquez-Olvera*, 999 F.2d at 947 n.8 ("[i]n our view, section 1325(a) has many of the common attributes of a sentence enhancement provision and should be interpreted as a sentence enhancement provision"); *Crawford*, 18 F.3d at 1178 ("the prior conviction in a § 1325 offense is, in our view, a sentence enhancement provision, rather than a separate criminal offense because both of the penalty provisions of § 1325 apply to any 'such offense' committed under that section").[8]

Moreover, even if Section 1325(a) were correctly interpreted to define more than one substantive offense, that construction would not carry over to Section 1326. The language and structure of Section 1326 does not duplicate or parallel that of Section 1325(a). Section 1326(b) alters the potential maximum term of imprisonment for a felony offense; the provision in Section 1325(a) that alters the punishment

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[8] Petitioner's amicus states that the government has conceded that Section 1325(a) defines "two separate offenses distinguished by a prior conviction," apparently relying on the statement in the *Campos-Martinez* opinion to that effect. See Nat'l Ass'n of Criminal Defense Lawyers Amicus Br. 12. Contrary to the implication of the statement in that opinion, however, the government did not make such a concession in that case. The government merely argued that, in construing Section 1326(b), the court should not rely on Section 1325 as an analogous statute. Gov't C.A. Br. at 10, *United States* v. *Campos-Martinez*, No. 91-50756 (9th Cir.).

also changes the nature of the conviction from a misdemeanor to a felony. Thus, "a prior conviction under section 1325(a) subjects a defendant to more than a simple sentence enhancement; instead, it subjects that defendant to an entirely different class of offense, a felony." *Vasquez-Olvera*, 999 F.2d at 947. The difference between the two provisions has led several courts to conclude that they were not intended to be interpreted in an identical fashion. *Id.* at 946 ("the two sections are too different for Congress to have intended for them to be interpreted similarly"); *Valdez*, 103 F.3d at 98 (Sections 1325 and 1326 "are too dissimilar to compel identical readings"); see also *Crawford*, 18 F.3d at 1178 (disagreeing with Ninth Circuit reliance on analogy to Section 1325); *Haggerty*, 85 F.3d at 405; *DeLeon-Rodriguez*, 70 F.3d at 766-767. Rather, Section 1326 must be interpreted in light of that provision's own distinctive text and background.[9]

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[9] Contrary to petitioner's assertion (Pet. Br. 11-12), the courts of appeals have not applied widely varying analyses in finding that Section 1326(b) is a penalty provision. Generally, they have relied on the language, structure, and legislative history. The Fifth Circuit's application of the *Davis* test (see note 2, *supra*) did not represent a wholly "alternative analysis," as petitioner asserts (Pet. Br. 20). Consideration of the *Davis* factors necessarily includes analysis of the structure and language of the statute, as petitioner concedes (Pet. Br. 11). See *Vasquez-Olvera*, 999 F.2d at 945-946. Only one court of appeals has found the language and structure of Section 1326 not dispositive in discerning congressional intent, and concluded that Section 1326(b)(2) should be read as a sentence enhancement provision because of policy concerns and precedent construing similarly structured statutes. *Forbes*, 16 F.3d at 1298-1300. That court did not have before it the legislative history discussed below. See *id.* at 1298.

B. The Legislative History Supports the Conclusion that Section 1326(b)(2) is a Penalty Enhancement Provision

1. As explained above, Section 1326(b)(2) was explicitly labeled a "penalty" when it was enacted in 1988. The legislative history surrounding that enactment also points unambiguously to the conclusion that Section 1326(b)(2) was intended as a sentence enhancement provision and not a new, substantive offense.

Legislation to authorize longer terms of imprisonment for aggravated felons who violate Section 1326 was introduced by Senator Chiles in 1987. See S. 973, 100th Cong., 1st. Sess.; 133 Cong. Rec. 8771-8773. That bill contained language substantially similar to the language ultimately enacted as Section 7345 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, adding subsection (b) to Section 276 of the INA, 8 U.S.C. 1326. See 133 Cong. Rec. 8772-8773 (1987). The bill was entitled "A bill to provide for additional criminal penalties for deported aliens who reenter the United States, and for other purposes." *Id.* at 8771. Senator Chiles explained that the bill "would impose stricter criminal penalties upon aliens who reenter the United States after having been deported." *Id.* at 8772. He specified that it would "provide for a three-tier penalty system for [deported] aliens who reenter with mandatory sentences for aggravated felons." *Ibid.*[10] He described the imprisonment terms for the

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[10] Senator Chiles' bill differed in substance from the legislation ultimately enacted in 1988 only in that his bill would have provided for a mandatory minimum sentence of 15 years' imprisonment (rather than authorizing a 15-year maximum term) for aggravated felons who violate Section 1326. 133 Cong. Rec. 8773 (1987).

three tiers as follows "first tier: any deported alien who reenters: up to 2 years * * *; second tier: any deported alien (nonaggravated felon) who reenters: up to 5 years * * *; and third tier: any deported alien (aggravated felon) who reenters: mandatory 15 years." *Ibid.*

A corresponding bill was introduced in 1987 by Representative Smith in the House of Representatives. See H.R. 3530, 100th Cong., 1st. Sess.; 133 Cong. Rec. 28,840-28,841. Representative Smith described the bill in the same manner, specifying the three-tier penalty structure. 133 Cong. Rec. 28,840-28,841.

During the next session of Congress, an identical proposal that would amend Section 1326 was introduced as Section 2918 of the Senate's omnibus anti-drug bill. S. 2852, 100th Cong., 2d Sess. § 2918 (1988); see 134 Cong. Rec. 27,505 (1988) (text of Section 2918). That section was titled "Criminal Penalties for Reentry of Certain Deported Aliens." 134 Cong. Rec. 27,505 (1988). The section-by-section analysis presented to the full Senate described the proposed amendment as a penalty provision:

> Section 2918.—Increases current penalty for illegal re-entry after deportation from up to 2 years imprisonment or up to $1000 fine to:
>
> Up to 5 years imprisonment and/or up to $10,000 for deported alien felons (other than aggravated alien felons).
>
> At least 15 years imprisonment and up to $20,000 fine for deported aggravated alien felons.

134 Cong. Rec. 27,429 (1988). Various sponsors of the Senate bill described the bill similarly, explaining that it "increases current penalties for illegal reentry after deportation," *id.* at 27,445 (remarks of Sen. D'Amato), and would "impose stiff penalties" against deported aliens convicted of drug offenses who attempt to reenter the United States, *id.* at 27,462 (remarks of Sen. Chiles). The provision was amended (to change the authorized sentence for aggravated felons from a proposed mandatory minimum of 15 years' imprisonment to a maximum of 15 years' imprisonment) and included as Section 7345 in the House amendment to the Senate amendment to H.R. 5210, 100th Cong., 2d Sess. (1988) (the House omnibus anti-drug bill). See 134 Cong. Rec. 33,238 (1988). It was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7345(a), 102 Stat. 4471. See 134 Cong. Rec. 33,238 (1988).[11]

The circumstances surrounding enactment of Section 1326(b)(2) thus provide every indication that Congress intended it to authorize increased penalties for certain Section 1326(a) offenders, not to constitute a free-standing offense. The history repeatedly refers to the new subsections as establishing "increased penalties." And the characterization of the proposed amendments as forming a three-tier penalty system is inconsistent with interpreting Section 1326(b) to define a new substantive offense.

2. Petitioner errs in contending (Pet. Br. 14-18) that the subsequent amendments to Section 1326 justify interpreting Section 1326(b)(2) to define a substantive criminal offense, rather than as a penalty provision. None of the subsequent amendments to Section 1326 undermines the conclusion that Section

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[11] No Senate or House report was submitted with the final legislation.

1326(b)(2) is a penalty provision. Rather, they reinforce that conclusion.

a. In 1990, Congress amended 8 U.S.C. 1326(a) (1988), in one minor respect, to update the penalty provision that had remained the same since enactment in 1952. See Immigration Act of 1990 (1990 Act), Pub. L. No. 101-649, § 543(b)(3), 104 Stat. 5059; see also App., *infra*, 4a-5a. As petitioner notes (Pet. Br. 16), the amendment made the penalty provision in subsection (a) (authorizing a fine and imprisonment of no more than two years) parallel to subsections (b)(1) and (b)(2), by altering the fine authorization to refer to Title 18[12] and by simplifying the statement of the authorized imprisonment term.

Contrary to petitioner's contention (Pet. Br. 16), the amendment did not evidence any intent on the part of Congress to treat subsections (a), (b)(1), and (b)(2) each as a separate substantive offense. Rather, the amendment was one in a series of amendments updating the phraseology of various penalty provisions in the INA. Before the 1990 amendment, the penalty provision in subsection (a) had identified the offense as a felony and stated that "upon conviction thereof" the defendant would be fined up to a specified maximum amount. 8 U.S.C. 1326 (1988). When that provision was simplified by the 1990 amendment, several other provisions of the INA that had been similarly worded were simultaneously amended in an analogous manner—to eliminate the superfluous wording and to

[12] The amendment thereby increased the level of the criminal fine authorized according to provisions of the criminal code that had been enacted in 1984 and were generally applicable to fines imposed in most felony offenses (including 8 U.S.C. 1326). Pub. L. No. 98-473, 98 Stat. 1995 (Oct. 12, 1984); 18 U.S.C. 3571.

add references to the fine provisions of Title 18. See 1990 Act § 543(b)(1) (amending Section 252(c) of the INA (8 U.S.C. 1282(c) (1988)); § 543(b)(2) (C) (amending Section 275 of the INA (8 U.S.C. 1325 (1988)); § 543(b)(4) (amending Section 277 of the INA (8 U.S.C. 1327) (1988)); § 543(b)(5) (amending Section 278 of the INA (8 U.S.C. 1328) (1988)).

Petitioner identifies nothing in the legislative history of the 1990 amendment to suggest that Congress intended anything other than to update the various fine provisions. In fact, such a suggestion would be defeated by the titles used by Congress in the sections of the 1990 Act that contained the amendment—Section 543 is titled "Increase in Fine Levels: Authority of the INS to Collect Fines," and subsection (b) is titled "Criminal Fine Levels." 1990 Act § 543(b), 104 Stat. 5057, 5059.

b. In 1994, Congress amended 8 U.S.C. 1326 (1988 & Supp. II 1990) in three respects, thus producing the version applicable to petitioner's offense. None of those amendments alter subsection (b)(2)'s character as a penalty provision. See App., *infra*, 6a-7a. First, Congress amended the penalty provision in subsection (b)(1) that previously applied to aliens who had been convicted of a nonaggravated felony before deportation to extend its coverage to aliens who had been convicted of "three or more misdemeanors involving drugs, crimes against the person, or both." Violent Crime Control and Law Enforcement Act of 1994 (1994 Crime Act), Pub. L. No. 103-322, Tit. XIII, § 130001(b)(1)(A), 108 Stat. 2023. Congress thereby determined that aliens who violate Section 1326 after having suffered three such misdemeanor convictions before deportation should be treated the same for sentencing purposes as aliens who had nonaggravated

felony convictions. Under petitioner's reasoning, however, that amendment would have created yet another substantive offense in Section 1326, an element of which would be the existence of three previous misdemeanor convictions for the listed offenses. But it is clear that that was not Congress's intention. The title of the section containing the amendment states, in relevant part, "Enhancement of Penalties For * * * Reentering, After Final Order of Deportation." 1994 Crime Act § 130001, 108 Stat. 2023.

Second, Congress increased the maximum terms of imprisonment authorized by subsection (b)(1) to ten years (applicable to cases involving aliens with nonaggravated felony convictions and three serious misdemeanor convictions), and authorized by subsection (b)(2) to 20 years (applicable to cases involving aliens with aggravated felony convictions). 1994 Crime Act § 130001(b)(1)(B) and (b)(2), 108 Stat. 2023. Third, Congress added a sentence to Section 1326(b) that defines "deportation" for purposes of subsection (b) to include stipulated agreements during criminal trials. 1994 Crime Act § 130001(b)(3), 108 Stat. 2023. None of those changes in the statute altered the character of Section 1326(b)(2) as a penalty provision.

c. In 1996, Congress amended Section 1326 on two different occasions. First, as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, Congress added subsections (b)(3), (c), and (d) to 8 U.S.C. 1326. App., *infra*, 8a-10a. Petitioner contends (Pet. Br. 17, 18) that subsections (b)(3) and (d) support his

interpretation of subsection (b)(2) as a separate offense.[13]

Subsection (b)(3) (added by AEDPA § 401(c), 110 Stat. 1267) mandates a nonconcurrent ten-year term of imprisonment in the case of an alien who violates Section 1326(a) by reentering without the Attorney General's permission if his previous exclusion or removal (Congress's new term for "deportation") was pursuant to 8 U.S.C. 1225(c) relating to terrorist activities (see 8 U.S.C. 1182(a)(3)(B)), or was pursuant to certain alien terrorist removal procedures (see AEDPA § 401(a), 110 Stat. 1258-1268 (adding new Sections 501-507 to INA)). Subsection (b)(3) is not "clearly" a new offense, "separate from those in subsection (a)," as petitioner claims (Pet. Br. 17). Congress entitled the subsection of AEDPA that added subsection (b)(3) to the INA as "Criminal Penalty for Reentry of Alien Terrorists." AEDPA § 401(c), 110 Stat. 1267. Petitioner cites no legislative

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[13] Petitioner does not discuss subsection (c), which provides that any outstanding portion of a criminal sentence that an alien was serving at the time of his removal must be served by the alien if he reenters without the consent of the Attorney General. See AEDPA § 438(b), 110 Stat. 1276 (citing former Section 242(h)(2) of the INA (8 U.S.C. 1252(h)(2)), as added by AEDPA, which authorized such removals in cases of nonviolent offenders). Subsection (c) also states that service of the remainder of that sentence cannot be reduced for parole or supervised release and that the alien "shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law." *Ibid.* Congress's reference to "other penalties relating to the reentry of deported aliens as may be available under this section" reflects Congress's view of reentry of deported aliens as a single criminal offense, with more than one penalty available under Section 1326 for those who commit that offense.

history or other authority to support his claim that it creates a new substantive offense, and is not merely a sentencing provision.

Subsection (d) (added by AEDPA, § 441(a), 110 Stat. 1279) restricts the ability of an alien to bring a collateral attack against an underlying deportation order in a criminal proceeding under Section 1326. Petitioner contends that his interpretation of Section 1326(b)(2) as a separate offense is supported by subsection (d)'s reference to "the deportation order described in subsection (a)(1) or subsection (b) of this section." He asserts that, if subsection (b) contained only sentence enhancements for offenses described in subsection (a), there would have been no need for Congress to refer "to both (a) and (b)" in Section 1326(d). Pet. Br. 18 (emphasis omitted).

Petitioner reads too much into the cross-reference contained in subsection (d). The reference is naturally read as an effort to ensure that all deportation orders that might be at issue in a criminal prosecution under Section 1326 would be covered. Petitioner points to nothing in the legislative history or elsewhere to suggest otherwise. Petitioner, in fact, states (Pet. Br. 18) that the reference in subsection (d) to a "deportation order described in * * * subsection (b)" cannot be given a precise meaning because the text of subsection (b) does not contain the phrase "deportation order" or contain any description thereof.

d. Congress's second set of amendments to Section 1326 in 1996 were included as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, 110 Stat. 3009-575. Congress thereby amended subsection (a), added subsection (b)(4) to Section 1326 and

directed the United States Sentencing Commission to take certain action regarding Section 1326. See IIRIRA §§ 305(b), 308(d)(4)(J)(i), 334, 110 Stat. 3009-606, 3009-618, 3009-635; see also App., *infra* 11a-14a.[14] Petitioner contends (Pet. Br. 17-19) that subsection (b)(4) and Congress's direction to the Commission support his interpretation of subsection (b)(2) as a separate offense.

Subsection (b)(4) (added by IIRIRA § 305(b), 110 Stat. 3009-606 to 3009-607), provides that, in the case of an alien who was serving a term of imprisonment at the time of his removal, and was removed before completion of that term (pursuant to procedures that permit such removal in cases of certain nonviolent offenders (see 8 U.S.C.A. 1231(a)(4)(B)), and reentered without the Attorney General's permission, the alien "shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both." Congress thereby ensured that aliens who violate Section 1326(a) after having been relieved of service of part of a criminal sentence (albeit for a nonviolent offense) before deportation shall not be limited to a two-year maximum term of imprisonment. The sentence authorized under subsection (b)(4) is in addition to completion of the unfinished predecessor sentence as required by subsection (c).

Subsection (b)(4) is not "clearly" a new offense, "separate from those in subsection (a)," as petitioner

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[14] Various other changes to Section 1326 made through IIRIRA, including conforming amendments that adopted the new terminology of the INA, substituting the term "removal" for the terms "deportation" and "exclusion," did not affect the substance of the provisions at issue here. See IIRIRA §§ 308(d)(4)(J), 308(e)(1)(K), 308(e)(14)(A), 110 Stat. 3009-618, 3009-619, 3009-620.

claims (Pet. Br. 17). It is true that certain features do make subsection (b)(4) more susceptible to such an interpretation than subsection (b)(2). Unlike the provision in the 1988 Act that added subsection (b)(2), the provision in IIRIRA that added subsection (b)(4) does not identify the new subsection as a penalty; and unlike subsection (b)(2), subsection (b)(4) restates certain elements of the offense defined in subsection (a). But those features of subsection (b)(4)—absent from subsection (b)(2)—do not support petitioner's contention that subsection (b)(2) must be construed to define a substantive criminal offense apart from that defined in subsection (a). To the contrary, the textual differences between subsections (b)(2) and (b)(4) reinforce the conclusion that subsection (b)(2) does not define a separate offense.

Petitioner overlooks the other substantive amendment to Section 1326 effected by IIRIRA. Congress amended subsection (a) to extend it to aliens who "departed the United States while an order of exclusion or deportation is outstanding." IIRIRA § 324(a), 110 Stat. 3009-629.[15] Congress thereby ensured that aliens who were previously ordered deported or excluded, but who evaded official enforcement of that order by departing from the United States on their own, also commit a violation of Section 1326(a) if they reenter without first obtaining the Attorney General's consent to reapply for admission. By adding that provision to subsection (a), Congress made clear that the offense conduct in Section 1326 is defined by

[15] The appendix to petitioner's brief erroneously includes this language, which was added by IIRIRA, in the version of Section 1326 that purports to contain only the changes effected through AEDPA. See Pet. Br. App. B8.

that Section 1326 subsection, not by the penalty enhancement provisions found in subsection (b)(2).

Petitioner places great weight on a provision of IIRIRA that directs the United States Sentencing Commission to promulgate "amendments to the sentencing guidelines to make appropriate increases in the base offense level for offenses under section 242(e) and 276(b) of the Immigration and Nationality Act (8 U.S.C. 1252(e), 1326(b)) to reflect the amendments made by section 130001 of the Violent Crime Control and Law Enforcement Act of 1994." IIRIRA § 334, 110 Stat. 3009-635. Petitioner contends (Pet. Br. 19) that, by cross-referencing to "offenses under section * * * 1326(b)," Congress evidenced an understanding that the provisions of subsection (b) enacted six years earlier be interpreted as separate crimes with elements different from the offense defined in subsection (a), rather than as penalty provisions.

At the time of Congress's directive to the Commission, the Sentencing Guidelines had not been amended to take account of Congress's expansion, in 1994, of the class of offenders subject to punishment under subsection 1326(b)(1).[16] The directive to the Commis-

[16] The relevant Sentencing Guideline applicable at the time of the enactment IIRIRA in 1996 had been unchanged in relevant part since November 1, 1991. U.S.S.G. § 2L1.2. Although the Guideline provided for a 16-level increase in the offense level where the defendant had been deported following an aggravated felony, and for a 4-level increase where the defendant had been deported following a non-aggravated felony, it did not provide for any offense level increase for defendants who had been deported following conviction of three misdemeanors involving drugs or crimes against the person—the class of offender that Congress had made subject to increased punishment in 1994.

sion was intended to eliminate the discrepancy between the class of Section 1326 offenders subject to enhanced punishment under the statute as amended in 1994, and the class subject to enhancement under the outdated Guidelines provision that did not take account of the 1994 statutory amendment. Although petitioner is correct that the directive cross-references only subsection (b), and not Section 1326 or subsection (a), that does not mean that Congress perceived subsection (b) to be a separate, substantive offense. The 1994 statutory amendment that was the basis for Congress's directive amended only subsection (b), not subsection (a). See 1994 Crime Act § 130001, 108 Stat. 2023. Therefore, it was natural for Congress to cross-reference only that subsection in its directive.

Moreover, a different cross-reference in IIRIRA clearly identifies subsection (b) as a penalty provision and subsection (a) as the substantive offense, the violation of which triggers application of enhanced penalties under subsection (b). In Section 321(c) of IIRIRA, Congress established the effective date for its contemporaneous amendments to the definition of "aggravated felony" for purposes of the INA. 110 Stat. 3009-628. Congress generally provided that the amendments would apply "to actions taken on or after the date of the enactment of [IIRIRA], regardless of when the conviction occurred," but then specified that the amendments "shall apply *under section 276(b)* of the [INA] only to *violations of section 276(a)* of such Act occurring on or after such date." *Ibid.* (emphasis added). The most reasonable interpretation of that provision is that if an alien violates Section 276(a) (8 U.S.C. 1326(a)), the penalties of Section 276(b) (8 U.S.C. 1326(b)) apply to his case, although the particular version of the penalties that applies (*i.e.* the version based on former definition of aggravated felony, or version based on new, expanded definition of aggravated felony) depends on whether the violation of Section 1326(a) occurred before or after the date IIRIRA was enacted. If Congress had understood subsection (b) to define a separate, substantive offense, rather than to provide enhanced penalties, it would not have referred to "violations of section [1326](a)."

C. The Rule of Lenity Does Not Require Adoption of Petitioner's Statutory Interpretation

The rule of lenity is a maxim of statutory construction that applies only in cases "where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Staples*, 511 U.S. at 619 n.17 (citations and internal quotation marks omitted). Lenity is reserved "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); see also *Wells*, 117 S. Ct. at 931 ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended.") (internal quotation marks omitted). As demonstrated above, examination of the text, structure, and history of Section 1326 provides sufficient guidance to reveal Congress's intent to make subsection (b) a penalty enhancement provision.

Moreover, the statute in this case does not implicate the principal purpose of the rule of lenity, *i.e.* to ensure that criminal statutes will provide "fair warning concerning conduct rendered illegal." *Liparota*, 471 U.S. at 427. The scope of the conduct prohibited by Section 1326 and the potential punishment authorized for particular violations are clear. Cf. *Bifulco*, 447 U.S. at 387 (recognizing that the rule has been applied to resolve questions regarding the substantive scope of criminal statutes and whether a sentence has been authorized by law). There is no ambiguity about the effect of Section 1326(b)(2): any alien who violates Section 1326(a), and who was convicted of an aggravated felony before his deportation, is subject to a maximum term of imprisonment of 20 years. Whether the prior criminal conviction is to be proven at sentencing, or during trial, the statute gives a defendant explicit warning of the illegality of his conduct and of the potential penalty attached to that violation of law.

In any event, even if it were ambiguous whether subsection (b) provided only for penalty enhancement, it is not clear that petitioner's interpretation would be required by the rule of lenity. Application of that rule requires adoption of the "less harsh meaning." *Ladner* v. *United States*, 358 U.S. 169, 177 (1958). But petitioner's interpretation may well be harsher as a general matter than the government's interpretation because of the possible prejudice to a defendant when his prior conviction is disclosed at trial. Cf. *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967) (upholding recidivist scheme where prior crime was alleged in indictment and revealed to the jury, but noting potential for prejudice from that procedure). The First Circuit has emphasized that the introduction of prior crimes

evidence at trial may be "especially prejudicial where, as here, the underlying crime (unlawful reentry following deportation) might not be viewed by the jury as particularly egregious." *Forbes*, 16 F.3d at 1300. That court also noted the "strong Congressional policy of avoiding introduction of this type of potentially prejudicial evidence in criminal trials," *id.* at 1299, and decided that "[i]n the absence of Congressional direction, we are reluctant to impose that burden on defendants," *id.* at 1300; see also *United States* v. *Lowe*, 860 F.2d 1370, 1376-1377 n. 9 (7th Cir. 1988) (recognizing that the potential prejudice in including a defendant's felony record in the indictment, and in presenting that type of evidence at trial, bears on the application of the rule of lenity), cert. denied, 490 U.S. 1005 (1989). As the court noted in *Forbes*, while a particular Section 1326 defendant who was indicted only under subsection (a) would be benefited by treating subsection (b) as a separate offense, future defendants would likely "have more to lose than gain from th[at] interpretation." 16 F.3d at 1300.[17]

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[17] There is no merit to petitioner's suggestion (Pet. Br. 43-45) that the Court exercise its supervisory power to require that prior convictions that increase a maximum punishment be treated as an element of the offense regardless of congressional intent. Supervisory authority does not justify overriding Congress's definition of the elements of criminal offenses. See *Staples*, 511 U.S. at 604 ("[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute") (quoting *Liparota*, 471 U.S. at 424).

D. Section 1326(b)(2)'s Authorization of Enhanced Maximum Terms of Imprisonment Based on a Sentencing Factor is Constitutional

Petitioner contends (Pet. Br. 28-29) that the Court should decline to interpret Section 1326(b)(2) as a sentencing enhancement provision because (in his view) that interpretation raises serious constitutional problems. He bases that contention on the premise that the Constitution mandates that his prior aggravated felony be alleged in an indictment and proven by a reasonable doubt because it serves to increase the maximum authorized sentence for his offense. See Pet. Br. 30-47.[18] Petitioner's premise is flawed.

Legislatures have wide discretion in identifying which facts must be proven to establish a crime and which facts are relevant only to the sentence.[19] The

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[18] Petitioner also contends (Pet. Br. 30-33) that sentencing enhancements increasing the maximum potential penalty are unconstitutional because applicability of various procedural rights, such as the right to trial by jury and the federal felony defendant's right to indictment by a grand jury, turns on the severity of the maximum authorized penalty. Where the underlying offense is a felony, however, as here, those rights are in any event applicable. This is not a case in which a sentencing enhancement increases the punishment in a manner that changes the nature of the offense and attendant procedural rights, *e.g.*, by changing the offense from a misdemeanor to a felony. See Pet. Br. 48 n.24 (discussing statutes that contain both misdemeanor and felony provisions).

[19] For example, the Court's decisions regarding capital sentencing schemes have made clear that factors that make a defendant eligible for a more serious penalty need not be elements of the underlying substantive offense and, thus, need not be charged or proven at trial. See *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (Sixth Amendment permits imposition of the death penalty based on judge's finding of aggravating circumstance that qualifies defendant for death sentence, because the aggravating circumstance is not an element of offense that must be determined by jury); *Spaziano* v. *Florida*, 468 U.S. 447 (1984) (Sixth Amendment does not require a jury trial on the sentencing issue of life or death and does not invalidate state scheme that permits trial judge to impose death sentence notwithstanding jury's recommendation of a sentence of life imprisonment); *Walton* v. *Arizona*, 497 U.S. 639 (1990) (holding that aggravating factors that qualify defendant for the death sentence need not be denominated by the State as elements of the offense, and rejecting capital defendant's argument that every finding of fact underlying a death sentence must be made by a jury).

Court has expressly "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (citing *Patterson*, 432 U.S. at 214). And "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan*, 477 U.S. at 85 (citing *Patterson*, 432 U.S. at 210).[20]

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[20] Petitioner's reliance (Pet. Br. 41-42) on *Specht* v. *Patterson*, 386 U.S. 605 (1967), is misplaced. *Specht* did not address the issue whether a legislature could provide for penalty enhancement factors to be established at sentencing, rather than at trial as elements of the offense. As the *McMillan* Court noted, *Specht* involved "a radically different situation" from the ordinary sentencing proceeding. *McMillan*, 477 U.S. at 89. Under the Colorado scheme at issue in *Specht*, conviction of a sexual offense otherwise carrying a maximum penalty of ten years exposed a defendant to an indefinite term, to and including life imprisonment, if the sentencing judge made a post-trial finding that the defendant posed "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." 386 U.S. at 607. That finding could be made, without notice or any "hearing in the

While "there are obviously constitutional limits" on the legislature's power to define the elements of an offense, *McMillan*, 477 U.S. at 85, there is no basis for petitioner's argument that the legislature must include in the definition of an offense the fact of a prior conviction if it increases the maximum sentence authorized for the offense. A defendant's prior criminal history is a traditional sentencing factor that may constitutionally be treated as a basis for imposing an enhanced penalty. See *McMillan*, 477 U.S. at 89. In this case, as in *McMillan*, the legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment" (*ibid.*) and prescribed an effect for that factor. It is particularly

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normal sense," based solely on a presentence psychiatric report. *Id.* at 608. The Court held that the Colorado scheme failed to satisfy the requirements of due process, and that the defendant had a right to counsel, notice, an opportunity to be heard, to cross-examine the witnesses against him, and to offer evidence of his own. *Specht* did not hold that the Constitution required that the facts supporting the enhancement be included as an element of the offense and proved to the jury beyond a reasonable doubt.

Addington v. *Texas*, 441 U.S. 418 (1979), is similarly irrelevant here (see Pet. Br. 32-33, 44-45), because that case involved the standard of proof for involuntary commitment to a mental institution, not criminal sentencing. The Court has rejected the argument that *Addington* requires application of the "clear and convincing" standard of proof in a criminal sentencing. *McMillan*, 477 U.S. at 92 n.8; see also *Parke* v. *Raley*, 506 U.S. 20, 28-34 (1992) (upholding against due process challenge a State's rule that imposes burden of production on defendant, in sentencing proceeding, to rebut presumption of the validity of prior conviction used for sentence enhancement); *id.* at 34-35 (rejecting argument that Constitution compels that prior conviction used to enhance punishment be proven by clear and convincing evidence).

appropriate for Congress to make an illegal-reentry defendant's commission of crimes before his deportation relevant to the authorized length of his sentence. By reentering this country illegally despite a prior deportation, an alien has manifested his willingness to repeat his violation of our laws. When an alien has, in addition, a record of criminal behavior during his prior stay here, a sentencing court may believe that a longer term of imprisonment is justified to incapacitate the offender and to send a stronger deterrent message. "The congressional codification of traditional sentencing factors does not transform 'a sentencing factor into an 'element' of some hypothetical 'offense.'" *United States* v. *Brewer*, 853 F.2d 1319, 1326 (6th Cir.) (quoting *McMillan*, 477 U.S. at 90), cert. denied, 488 U.S. 946 (1988).[21]

Petitioner attempts to distinguish *McMillan* (Pet. Br. 45-47) because the statute there enhanced only the mandatory minimum sentence and did not alter the maximum penalty authorized for the offense. The *McMillan* opinion, however, did not adopt the distinction petitioner suggests. In rejecting the *McMillan* defendants' argument that the sentencing enhance-

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[21] The Court noted in *McMillan* that the courts of appeals had "uniformly rejected due process challenges to the preponderance standard under the federal 'dangerous special offender' statute, 18 U.S.C. § 3575 (repealed), which provides for an enhanced sentence if the court concludes that the defendant is both 'dangerous' and a 'special offender [*i.e.* had been convicted of specified criminal offenses that yielded imprisonment terms]." 477 U.S. at 92-93 (citing *United States* v. *Davis*, 710 F.2d 104, 106 (3d Cir.), cert. denied, 464 U.S. 1001 (1983)). That statute authorized a maximum term of imprisonment up to 25 years, which constituted an increase in the maximum penalty authorized under many federal statutes. See *Davis*, 710 F.2d at 105.

ment factor at issue (visible possession of a firearm) must be proven beyond a reasonable doubt because it was "'really' an element of the offenses for which they [were] being punished," the Court merely commented that the defendants' argument would have had "at least more superficial appeal" if a finding of that factor "exposed them to greater or additional punishment." 477 U.S. at 88. It did not state that the outcome of the case would have been different in such circumstances.[2]

Petitioner also relies on a series of cases predating *McMillan* that petitioner characterizes as evidencing a "traditional rule," the common law, and state and federal practice, requiring that a prior conviction that increased a maximum sentence be alleged in an indictment and proven beyond a reasonable doubt. See Pet. Br. 30, 33-39, 44. Many of the cases cited by petitioner concern due process notice requirements that are not at issue here, or statutory requirements that the prior conviction be proven as an element of the offense. See, *e.g.*, *Massey* v. *United States*, 281 F. 293, 297-298 (8th Cir. 1922); *Singer* v. *United States*, 278 F. 415, 419-420 (3d Cir.), cert. denied, 258 U.S. 620 (1922). In any event, the Court has made clear that whatever the practice might have been in some jurisdictions to proceed by indictment and proof beyond a reasonable doubt in recidivist cases, that practice is not mandated by the Constitution.

In *Graham* v. *West Virginia*, 224 U.S. 616 (1912), the Court rejected a criminal defendant's constitutional challenge to the sentence of life imprisonment that had been imposed pursuant to a state recidivist sentencing procedure that followed his conviction on grand larceny charges. The life sentence supplanted an original sentence of five years' imprisonment imposed upon his plea of guilty. 224 U.S. at 621. The life sentence was mandated under state law in cases involving offenders, like the defendant in question, who had been convicted twice before of offenses that yielded terms of confinement in a penitentiary. *Id.* at 621-622.

The defendant in *Graham* claimed that his sentence was imposed in violation of various constitutional guarantees, including his right to due process, because the punishment was imposed in a proceeding where the defendant "was not held to answer for an offense" and that was "clearly not for the establishment of guilt." 224 U.S. at 624-625 (citation to lower court opinion omitted). The defendant was merely accorded the opportunity to contest his identity before a jury. In a unanimous opinion for the Court rejecting petitioner's claim, Justice Hughes wrote:

> It cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately. While it is familiar practice to set forth in the indictment the fact of prior conviction of another offense, and to submit to the jury the evidence upon that issue together with that relating to the commission of the crime which the indictment charges, still in its nature it is a distinct issue, and it may appropriately be the subject of separate determination.

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[2] In fact, the Court noted that, "[b]y prescribing a mandatory minimum sentence," the statute in question "incidentally serves to restrict the sentencing court's discretion in setting a maximum sentence." 477 U.S. at 88 n.4.

Id. at 625. The Court emphasized that it was irrelevant whether the defendant's former convictions were known at the time of his indictment and trial on the underlying substantive offense. It explained that

> [a]lthough the state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt and thereupon for the imposition of the full sentence prescribed, *there is no constitutional mandate* which requires the State to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. *This conclusion necessarily follows from the distinct nature of the issue and from the fact, so frequently stated, that it does not relate to the commission of the offense, but goes to the punishment only, and therefore it may be subsequently decided.*

Id. at 629 (emphasis added); see also *id.* at 625-627 (discussing fact that "[i]t was established by statute in England," that prior conviction was alleged in indictment and not presented to jury until after verdict of guilty, but explaining that government may also proceed in a later proceeding based on an information to ascertain the defendant's identity, because in both situations "the fundamental rights of the defendant with respect to the ascertainment of his liability to the increased penalty may be fully protected").[23]

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[23] The Court's ruling in *Graham* that the State need not allege the prior convictions in an indictment was not based on the inapplicability of the right to indictment by a grand jury to the States. See *Hurtado* v. *California*, 110 U.S. 516, 538 (1884). The basis for the Court's ruling that an indictment was not necessary was its conclusion that "[t]here is no occasion for an indictment * * * [because] the inquiry is not into the commission of an offense; as to this, indictment has already been found and the accused convicted. There remains simply the question as to the fact of previous conviction." *Graham*, 224 U.S. at 627.

In a later case involving the same statute, the Court made clear that its reasoning applied to instances where the penalty provision increased the maximum term of imprisonment. In *Oyler* v. *Boles*, 368 U.S. 448, 449-451 (1962), one defendant had been convicted of an offense that carried a maximum penalty of 18 years' imprisonment and the other defendant had been convicted of an offense that carried a maximum penalty of ten years' imprisonment. After conviction and before sentence, both of them were informed that they were subject to the same state recidivist law because they had suffered two prior convictions for offenses punishable by confinement in the penitentiary. 368 U.S. at 450-451. Application of that recidivist law did not merely increase the authorized maximum sentence, as is the effect of Section 1326(b); the state recidivist law mandated an enhanced sentence of life imprisonment.[24] In the course of rejecting the defendants'

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[24] There is thus no merit to petitioner's reliance (Pet. Br. 23-24, 30, 46) on Section 1326(b)'s increase in the maximum by five or tenfold. The increase at issue in *Oyler* was far greater. See also *Hildwin*, 490 U.S. at 639-640 (holding that Sixth Amendment does not require that jury make finding of aggravating circumstance that comes into play after the defendant has been found guilty and that permits imposition of death sentence, and specifying that nothing in *McMillan* "suggests otherwise").

various constitutional challenges, the Court again emphasized that due process does not require that prior convictions that enhance punishment be charged by indictment or that defendants be given notice of them before trial on the substantive offense.[25]

Due process does require "reasonable notice and an opportunity to be heard relative to the recidivist charge." *Oyler*, 368 U.S. at 452.[26] But petitioner had

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[25] Numerous courts of appeals have upheld against constitutional challenge various federal statutes that increase the maximum sentence authorized by a statute based on the existence of prior convictions or other aggravating factors. See, *e.g.*, *United States* v. *Rumney*, 867 F.2d 714, 718-719 (1st Cir. 1989) (enhancement under the Armed Career Criminal Act (ACCA) (former 18 U.S.C. App. 1202(a) (1982)) based on prior convictions upheld against constitutional challenge); *United States* v. *Hawkins*, 811 F.2d 210, 220 (3d Cir. 1987) (same); *United States* v. *Davis*, 710 F.2d at 106-107 (upholding dangerous special offender statute, former 18 U.S.C. 3575 (1976)); *United States* v. *Affleck*, 861 F.2d 97, 99 (5th Cir. 1988) (upholding enhancement under 18 U.S.C. 924(e) for defendant with prior convictions), cert. denied, 489 U.S. 1058 (1989); *Lowe*, 860 F.2d at 1378-1379 (upholding enhancement under 18 U.S.C. 924(e)); *Brewer*, 853 F.2d at 1326-1327 (upholding enhancement under ACCA); *United States* v. *Neary*, 552 F.2d 1184, 1190-1195 (7th Cir.) (upholding dangerous special offender statute, former 18 U.S.C. 3575 (1976)), cert. denied, 434 U.S. 864 (1977); *United States* v. *Segien*, 114 F.3d 1014, 1018 (10th Cir. 1997) (upholding enhancement under 18 U.S.C. 111(b) for assault where deadly weapon is used).

[26] The *Oyler* Court (368 U.S. at 452) explained that "[s]uch requirements are implicit within" the Court's decisions in *Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Reynolds* v. *Cochran*, 365 U.S. 525 (1961); and *Chandler* v. *Fretag*, 348 U.S. 3 (1954). The Court noted that those cases concerned the right to counsel, but reasoned that such a right would have been an

full notice and an opportunity to be heard on the question whether he had sustained an aggravated felony conviction. J.A. 5, 12. The Constitution does not also require that Congress make the prior crime an element of the offense that must be alleged in the indictment and established at trial. Because no serious constitutional question is raised by consideration of the aggravated felony at sentencing, principles of constitutional avoidance (Pet. Br. 28-29) do not justify construing Section 1326(b) to state a separate and independent offense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
WILLIAM C. BROWN
Attorney

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"idle accomplishment" absent notice and a right to be heard. 368 U.S. at 452. *McMillan* makes clear that that principle does not extend to petitioner's claim of a right to indictment and proof beyond a reasonable doubt for sentencing factors. 477 U.S. at 84.

APPENDIX*

1. 8 U.S.C. 1326 (1952), as enacted on June 27, 1952, ch. 477, Title II, ch. 8, § 276, 66 Stat. 229:

§ 1326. Reentry of deported alien

Any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter[1] or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

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* In each version of the statute, the text that was deleted by the amendment is lined through and text that was added by the amendment is underlined.

[1] This reference and other references to other portions of the Immigration and Nationality Act (INA) and the code were altered slightly by the codifiers to conform with the designations in the code. Those alterations do not affect the substance of the statute, however, and are not otherwise noted in this appendix.

2. 8 U.S.C. 1326 (1988) (reflecting amendments made by Pub. L. No. 100-690, Title VII, § 7345(a), 102 Stat. 4471 (November 18, 1988)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens[2]

~~Any alien~~

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more

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[2] The second clause in the catchline appears to have been added by the codifiers based on the title of the provision in the Anti-Drug Abuse Act of 1988 that added subsection (b) to the statute. See Pub. L. No. 100-690, § 7345, 102 Stat. 4471. The alteration in the code catchline has been carried over in subsequent codifications, although the title of the Immigration and Nationality Act does not appear to have been so amended.

than two years, or by a fine of not more than $1,000, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

3. 8 U.S.C. 1326 (1988 & Supp. II 1990) (reflecting amendments made by Pub. L. No. 101-649, Title V, § 543(b)(3), 104 Stat. 5059 (November 29, 1990)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be ~~guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000~~ fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of a felony (other than an aggravated felony), such alien shall be fined under

title 18, imprisoned not more than 5 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 15 years, or both.

4. 8 U.S.C. 1326 (1994) (reflecting amendments made by Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (September 13, 1994)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who —

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than ~~5~~ 10 years, or both; or

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than ~~15~~ 20 years, or both.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

5. 8 U.S.C.A. 1326 (reflecting amendments made by AEDPA, Pub. L. No. 104-132, Title IV, §§ 401(c), 438(b), 441(a), 110 Stat. 1267, 1276, 1279 (April 24, 1996)):

§ 1326. Reentry of deported alien; criminal penalties for reentry of certain deported aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; ~~or~~

(2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both; or

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.

For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2) of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation

order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

6. 8 U.S.C.A. 1326 (reflecting amendments made by IIRIRA, Pub. L. No. 104-208, Div. C, Title III, §§ 305(b), 308(d)(4)(J), (e)(1)(K), (14)(A), 324(a), (b), 110 Stat. 3009-606, 3009-618, 3009-619, 3009-620, 3009-629 (September 30, 1996)):

§ 1326. Reentry of ~~deported~~ removed alien; criminal penalties for reentry of certain ~~deported~~ removed[3] aliens

(a) Subject to subsection (b) of this section, any alien who—

(1) has been ~~arrested and deported, has been excluded and deported,~~ denied admission, excluded, deported, or removed or has departed the United States while an order of ~~exclusion or deportation~~ exclusion, deportation, or removal is outstanding and thereafter[4]

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to

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[3] As noted above, the second clause of the catchline in the codified version of the statute apparently was added in 1988. When the title of Section 276 of the INA was amended by Congress to replace the term "deported" with "removed" the codifiers apparently altered the second clause of the catchline accordingly.

[4] Subsection (a)(1) was first amended by IIRIRA § 324(a) as follows:

(1) has been arrested and deported, has been ~~or~~ excluded and deported, or has departed the United States while an order of exclusion or deportation is outstanding and thereafter

110 Stat. 3009-629. IIRIRA § 308(d)(4)(J) then amended subsection (a)(1) "as amended by section 324(a)" in the manner set forth in the text above. 110 Stat. 3009-618.

his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously ~~excluded and deported~~ denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose ~~deportation~~ removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both;

(2) whose ~~deportation~~ removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both; ~~or~~

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, and imprisoned for

a period of 10 years, which sentence shall not run concurrently with any other sentence or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both

For the purposes of this subsection, the term "~~deportation~~ removal" includes any agreement in which an alien stipulates to ~~deportation~~ removal during (or not during) a criminal trial under either Federal or State law.

(c) Any alien deported pursuant to section 1252(h)(2)[5] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the re-

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[5] As amended by AEDPA, this cross-reference referred to a provision of the INA that authorized deportation of certain nonviolent offenders prior to completion of their sentences of imprisonment. See AEDPA § 438(a), 110 Stat. 1275 (amending Section 242(h) of the INA (8 U.S.C. 1252(h)) to include subsection (h)(2)). That section of the INA was amended by IIRIRA to address the issue of judicial review of removal orders, but a new section containing the same substantive provision relating to deportation of certain nonviolent offenders was simultaneously enacted through IIRIRA as Section 241(a)(4)(B) of the INA (to be codified at 8 U.S.C. 1231(a)(4)(B)). See IIRIRA §§ 305(a), 306(a)(2), 110 Stat. 3009-597, 3009-607. IIRIRA did not, however, correct the cross-reference in subsection (c) as reflected in the text above.

mainder of the sentence of imprisonment which was pending at the time of ~~deportation~~ removal without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.